4

Issues Concerning the Judiciary

LEARNING OBJECTIVES

In this Chapter, you will learn about:

- Judiciary Under Indian Constitution and Supreme Court
- Position of Supreme Court Under the Constitution
- Independence of Judiciary
- Issues in Judicial Appointments
- Conceptualizing Relevant Terms and Expressions
- Meaning of Judicial Review
- Judicial Activism in India
- Judicial Reforms
- Bangalore Declaration

> "*Justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of justice*"
>
> —R.P.Sethi, J. in Lily Thomas vs. Union of India, (2000) 6 SCC 224.

4.1 JUDICIARY UNDER INDIAN CONSTITUTION AND SUPREME COURT

The Constitution of India which came into force on 26th January 1950 contains a number of provisions concerning the structure, function and powers of the judiciary. It envisaged a unified judicial system both in Centre and States, Union Territories. It brought in a three-tier judicial system viz. Supreme Court at the Apex, High Court as the highest courts in the States and Union territories, and finally subordinate judiciary in every state and union territory arranged in a hierarchy. However, the Constitution contains only the provisions relating to Supreme Court and the High Courts and leaves the subordinate judiciary to the respective states.

The position and role of the Supreme Court came up before the Constituent Assembly for consideration. A special committee was then setup to consider and give report on the Constitution and powers of the Supreme Court. This committee comprised of *Alladi Krishna Swami Ayyar,*

K.M. Munshi, S. Varadachari, B.N. Rau, and B.L. Mitter. The report of this committee was mostly based on the provisions of the Act 1935. These recommendations are summarised as follows:

- Supreme Court has to be regarded as a necessary instrument in any federal setup.
- The Supreme Court should have final and appellate jurisdiction on questions concerning constitutional validity of the laws.
- Supreme Court should be the effective forum for the adjudication of all disputes concerning Union and constituent states or between two states and the Court should have exclusive and original jurisdiction in such matters.
- Apart from this, the Supreme Court should be vested with advisory jurisdiction.

And hence, based on this fundamental idea, the framers of the Constitution provided for a Supreme Court, the position of which with reference to its powers is considered to be an Appellate Court, as a federal court and as the guardian of the Constitution.

4.2 POSITION OF SUPREME COURT UNDER THE CONSTITUTION

Under the Constitution which was adopted by the people, the Supreme Court was bestowed with wide powers which were essential to the concept of constitutionalism. In a federal setup, the written Constitution, is considered to be the supreme. Protection of the values enshrined in the Constitution, which is the supreme lex of the land, lies with the judiciary. This is the fundamental duty given to the Court by the makers of the Constitution. Though the parliamentary form of government was adopted from the British, the setup of judiciary was taken from that which was prevailing under the U.S. Constitution. Unlike in Britain, the judiciary has been given a prominent position under the Indian Constitution.

- The constitutional expert Granville Austin points out that, during the British period, even though there were number of Indians in the government, they were not involved or responsible for the laws made.
- Neither the law nor the courts were for the Indians, they were established only to promote the colonial interest.
- Such position of courts under the Constitution was considered to be as one the most significant evidences of independence.
- Though after independence the country inherited a well-constructed and a smooth functioning judicial system from the British, which could have been directly adopted, the constitutional makers sought to make the judicial system reflect the needs and aspirations of an independent nation.

Hence, at the time of framing the Constitution, the Members raised the following queries, which provisions should be retained, and if, indeed they were retained, how they should be changed and how the jurisdiction and the powers of the courts be increased to meet the changing needs. With regard to establishment of the Supreme Court – an ad hoc committee comprising of five members – *Alladi Krishna Swami Ayyar, B.N. Rau, S. Varadachari, K.M. Munshi and B.L. Mitter* took upon the work. The very first recommendation by this committee bestowed upon the Court the power of judicial review. The court should be empowered with jurisdiction to decide upon the validity of the laws and acts as it is essential in a federal setup.

The important reason for preferring the American system of judiciary to that of system in Britain, is because of the fact that the Constitution provided for a federal system of government and hence if the judiciary is weak or insignificant as the one prevailing in Britain, it would not be able to uphold the federal principles. Moreover, there was no separate provision on the

fundamental rights in Britain, whereas India like in the United States has a separate section within the Constitution providing certain inalienable and inherent fundamental rights. Since the Constitution has set up a federal state, the judiciary should therefore uphold the supremacy of the Constitution besides that of the federal principle. Hence, without the power of judicial review, the judiciary could not have accomplished such tasks such as that of limiting the power of the government. Thus, it was for the fitness of things that the framers of the Constitution opted for a stronger judiciary than that of the one prevailing in the United Kingdom.

The position of Supreme Court of India can be seen with reference to its power as an Appellate Court, guardian of the Constitution and as a federal court.

4.2.1 As a Federal Court

It is understood that a federal court is an essential element in a federal Constitution. It is the final interpreter and guardian of the Constitution, and it also determines the disputes between the constituent elements in the federal setup. It is understood that every federal Constitution aims to distribute power between the Union and the constituent state governments which are the units in the federal setup. While in a Unitary Constitution, there arises no such problem, as the local or legislative bodies are mere subordinates of the central authority. Hence, there is no need for the judiciary to determine disputes between the centre and the states.

- In a federal State, which is having a written Constitution, the powers are divided between the centre and the state governments, and it is therefore essential for some authority to determine and decide upon the disputes between them, and to maintain the distribution of the powers guaranteed by the Constitution.
- In a federal setup, the judiciary is given additional burden, apart from its role of guarding the Constitution from the transgressions by the other organs of the state, to effectively maintain the distribution of powers as recommended by the Constitution as to prevent encroachments by the Union and the State governments.
- In short the Supreme Court is considered to be the *'umpire in federal system'*.

There is no explicit agreement or treaty to distribute powers in the federal setup, but there is nevertheless, division of legislative as well as administrative powers between the Centre and the States. It is important to mention here that the Schedule VII to the Constitution contains three lists namely the Union, the State and the Concurrent lists, clearly separating, the domain of power of legislature of the Centre and the States. Administrative powers are dealt by the **Articles 256 to 263** of the Constitution which lay down the respective jurisdiction of the Union and the States. The **Articles 264 to 293** deal with the financial relation between the Centre and the States. Apart from this other disputes may occur in other areas such as demarcation of the boundaries, usage of water, power and other natural resources.

Hence, the **Article 131** of the Constitution vets the Supreme Court with original and exclusive jurisdiction to determine and decide upon the disputes between the Centre and the States and the States *inter se*. The article is read as under:

Article 131–Original Jurisdiction of the Supreme Court

Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute

a. *between the Government of India and one or more States; or*
b. *between the Government of India and any State or States on one side and one or more other States on*

c. *between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends: Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagements, and or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.*

It is the interpretation made by the Supreme Court in particular cases that will hold all the forces in balance and save the original distribution of powers between the centre and states from encroachment by the Union. In this context we can observe from the words of *Sir Alladi Krishna Swami Ayyar* to quote:

> *…(the Supreme Court) has to keep the poise between the seemingly contradictory forces. In the process of the interpretation of the Constitution, on certain occasions it may appear to strengthen the Union at the expense of the Units at another time it may appear to champion the cause of provincial autonomy and regionalism.*

Thus, it is essential that the Supreme Court maintains the fine balance between the power of the Union and the rights of the States, while exercising its original power under the Article 131 of the Constitution.

4.2.2 As a Court of Appeal

The Supreme Court of India is considered to be the final appellate authority of the land, and most of the functions performed by the Apex court are in relation to its appellate jurisdiction. The Supreme Court thus exercises jurisdiction in relation to civil, criminal and constitutional matters. **Articles 132 to 136** deal with that of the appellate jurisdiction of the Supreme Court.

According to **Article 132** of the Constitution, an appeal to the Supreme Court lies to the Apex Court from any judgement, decree or final order of any High Court, in the territory of India in any civil, criminal or other proceedings, provided it involves a substantial question of law as to the interpretation of the Constitution, and the concerned High Court certifies to that effect.

Thus, this **Article 132**, ensures that though the High Court may decide upon the validity of an act or any other question involving interpretation of the Constitution, in all such cases the decision of such High Court shall not be the final and that the authority of interpreting the Constitution must rest with only the Supreme Court.

a. **Civil Appellate Jurisdiction**

Under **Article 133** of the Constitution, the Supreme Court, exercises appellate jurisdiction in civil matters as decided by the High Courts.

According to this Article, an appeal lies to the Supreme Court from the High Court from any decree, judgement or final order in a civil proceeding of a High Court in the territory of India, and if the High Court itself certifies under Article **134-A** that the matter involves substantial question of law of general importance and that in the opinion the High Court has to be addressed by the Supreme Court.

Before the 30th Constitutional Amendment, there were three alternative grounds for appeal to the Court from the High Courts in a civil proceeding, which were similar to the provisions under Sections 109, 110 of the Code of Civil Procedure, 1908. These grounds were:

1. Value of the appeal being ₹20,000 and above.
2. The matter on appeal indirectly involving some value.
3. The case being otherwise fit for appeal.

And as per aforementioned amendment, all these grounds were replaced by practically one ground viz., that the case involved substantial question of law and in the opinion of the High Court, it needs to be decided by the Supreme Court. Hence, no appeal shall lie to the Supreme Court after the date of Amendment (27-2-1973) on the grounds of pecuniary value.

The most important aspect in relation of the civil appellate jurisdiction of the Supreme Court is that because of the 30th amendment, in civil cases there is no category as a matter of right of appeal to the Supreme Court.

b. **Criminal Appellate Jurisdiction**

Prior to the enactment of the Constitution of India, there was no court of criminal appeal over and above the High Courts. Only the *Privy Council* had the power to entertain appeals in matters relating to criminal cases, though only within a limited range. The Privy Council was vested with the discretionary power and was the sole judge to grant special leave to adjudge the appeal worthiness of a criminal appeal, and these were granted only in exceptional cases.

The Constitution, by **Article 134**, set up a criminal court of appeal above the High Courts, although with limited jurisdiction. This **Article 134** empowers the Supreme Court to hear appeals from any sentence, judgement or final order in criminal proceedings of High Courts, in three cases:

1. If the High Court, on appeal, reverses the decision of acquittal of an accused person and sentences him to death. This will be the case of second appeal in a criminal case.
2. If the High Court has withdrawn for trial, to itself any case before a subordinate court and, after trial sentences him to death.
3. Besides the above two grounds, if the High Court under Article 134-A certifies that the case is a fit one for appeal to the Supreme Court.

Thus, it can be clearly seen that the criminal appellate jurisdiction of the Supreme Court is limited and is only sparingly invoked.

c. **Constitutional Appellate Jurisdiction**

The Supreme Court is empowered under **Articles 132(1), 133(1) and 134(1)** of the Constitution to hear appeals in matters related to civil, criminal or other proceedings, if the case involves a substantial question of law as to the interpretation of the Constitution itself.

The High Court under **Article 134-A** has the power to certify, if it is satisfied, that a particular matter in reference to civil, criminal or other proceedings involves a substantial question as to the interpretation of the Constitution. This power can be invoked either *suo motu* by the High Court itself, or by application made by the aggrieved party to it. This certificate can be granted only when such application is made immediately after passing of such decree, judgement, final order or sentence.

List of instances which can be said to be instances of question involving Constitutional interpretation are as follows:

1. Cases involving direct interpretation of some particular provision of the Constitution.
2. The question of application of a particular act to the facts of a case.
3. A conviction under a law which is challenged as '*ultra vires*'.
4. A suit or proceeding challenging particular statute as '*ultra vires*' or '*inconsistent*' with some mandatory provision of the Constitution.

Once such certificate is granted under **Article 134-A** by the High Court, the jurisdiction to hear such appeals is then vested with the Supreme Court and the aggrieved party can then file an appeal before the apex court by virtue of it and as a matter right, provided other provisions under the Article 134-A is complied with.

d. **Special Leave Appeal to the Supreme Court**

Apart from the provisions of regular appeals from the proceedings of the High Court given under **Articles 132 to 134-A**, there still may be some cases, where justice might require the interference of the Supreme Court. The Supreme Court thus can not only intervene in matters coming from High Court, but also from matters arising in any other court or tribunals. The framers have given the power to decide about the appeal worthiness of a case to the Supreme Court and not to the lower courts.

Hence, **Article 136** of the Constitution grants discretionary power to the Supreme Court to allow special leave appeals from any judgement, decree, determination, order or any sentence in any cause or matter passed or made by any court or tribunal in the territory of India.

Thus, this article vests an extraordinary power upon the Supreme Court in the matters of entertaining and hearing of appeals from any courts or tribunals by grant of special leave of appeal. In this context, any court includes the High Courts also, but does not include those of the army court or tribunal.

The Supreme Court opined that this power was rather a duty vested with it, to interfere in matters of serious miscarriage of justice and it is not curtailed by any limitation as to who may invoke this discretionary jurisdiction. As far as matters related to High Courts are concerned, **Article 136** can only be invoked in cases where the Court refuses to grant certificate under **Article 134-A** of the Constitution.

This provision of granting special leave under **Article 136** is sparingly used by the Supreme Court. Hence, it is clear that unlike the Court in United States which deals with only the federal and constitutional law issues, the Apex Court here is the final court of appeal on not just such issues, but also on any other matters of the ordinary law, civil, criminal or revenue. This gives wide scope for the Supreme Court to assert itself whenever the need is felt and found necessary based on the facts and circumstances of the case.

4.2.3 As a Guardian of the Constitution

The Supreme Court of India has the duty and the obligation to guard and protect the Constitution by upholding the Constitutionalism. This obligation overshadows its other roles as a federal court and as the court of final appeal in non-constitutional matters.

- The Constitution is regarded as the supreme law of the land by various constitutional systems around the world.

- Many of the written Constitutions which follow the theory of constitutional supremacy, have expressly declared in the Constitution itself that – *the Constitution is the Supreme law of the land.*

The question whether the Courts shall be guardian and interpreter of the Constitution is not based on the written or un-written nature of the Constitution, but is rather based on the theory of constitutional supremacy and the parliamentary sovereignty whereby the powers of the legislature are restricted. The British concept of parliamentary sovereignty can be cited as an example in this context.

As far as India is considered, the Constitution sets up a federal system, and also guarantees certain fundamental rights. There is no express provision in the Constitution itself, declaring it to be the supreme law of the land. Such declaration was considered to be superfluous by the framers of the Constitution, as all the organs derived power from the Constitution, and the Constitution cannot be easily altered save in the manner laid down in the Constitution itself.

It has also to be stated that there is no specific provision in the Constitution empowering the courts to invalidate the laws, but the Constitution has imposed certain limitations upon each of the organ and any transgression of such limitations will make those acts void. And the power is vested with the courts to decide whether any of the constitutional limitations has been transgressed or not.

The following Constitutional provisions substantiate the abovementioned statement:

1. **Article 13** of the Constitution declares that any law which contravenes any of the provision of Part III of the Constitution dealing with the fundamental rights, shall be declared void.
2. **Articles 251 and 254**, in case there is inconsistency between Union and States law, the state laws are declared as void.
3. **Article 246** expressly provides that the Centre and State legislatures have legislative powers over a specified list of subjects (list I, II and III).
4. **Article 245** makes the powers of both Parliament and State legislature, 'subject to the provisions of the Constitution'.

Thus, the Constitution has imposed certain limitations upon the legislative powers in the form of

1. Fundamental rights guaranteed under Part III of the Constitution.
2. Legislative competence.
3. Territorial limitation of the State legislatures.

So the courts have the power to pronounce upon the validity of any law on the above said grounds. The transgression of its powers by any legislature can be effectively checked by the higher judiciary in general and the Supreme Court in particular, with the powers of judicial review bestowed upon them under various provisions in the Constitution.

The court is also vested with the powers to check upon the excesses committed by the executive. Apart from its jurisdiction to hear cases from alleged illegal acts, the Supreme Court has been given extraordinary revisional powers through the judicial writs of *Quo-Warranto, Certiorari, Habeas Corpus, Prohibition and Mandamus* under **Article 32**. The Supreme Court is thus vested with power to issue appropriate writ when the fundamental right is infringed by any administrative or quasi-judicial body.

Sir Alladi Krishna Swami Ayyar, the illustrious member of the Constituent Assembly summed up the position and powers of the Supreme Court as follows:

> *With the expansion of the sphere of governmental activity, inevitable, under modern conditions in spite of the strong criticism of the late Lord Chief Justice of England, the institution of Administrative Tribunals and agencies invested with judicial or Quasi-judicial functions will continue to be a feature of modern government and has almost become unavoidable. The only safeguard against the abuse of powers vested in such tribunals and bodies is in the ultimate or revisory jurisdiction being vested in the higher courts of the realm and in the Supreme Court.*

Thus, it can be clearly seen that the Supreme Court of India is the supreme and the fundamental guardian of the Constitution of India and also the supreme protector of fundamental rights of the people.

4.2.4 As a Protector of Fundamental Rights

The Constitution in its Part III contains **Articles 12 to 35**, which guarantees and protects the fundamental rights of the people. The unique feature of these fundamental rights is that these are not only considered to be fundamental but also their implementation is considered to be a fundamental right in itself. The last fundamental right in the Part III namely the right to constitutional remedies makes the Supreme Court the protector of the fundamental rights of the citizens. **Articles 32 to 35** deal with this most important fundamental right.

Article 32 is reads as follows:

32. Remedies for enforcement of rights conferred by this Part

1. *The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed*
2. *The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part*
3. *Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)*
4. *The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution*

The mere declaration of fundamental rights is not sufficient unless there are proper judicial remedies for their enforcement. **Article 32** provides such remedy and bestows upon the Supreme Court the status of champion of fundamental right, as the right to move to court in case of violation of fundamental right is itself a fundamental right.

The Supreme Court is hence considered to be the protector and guarantor of fundamental rights, and under **Article 32**, it is the duty of the courts to grant relief, where the existence of fundamental rights and its violation is clearly established. The Supreme Court considers the jurisdiction conferred to be by the **Article 32** as '*an integral and important part of the basic structure of the Constitution*'. Because it is meaningless to give fundamental rights without providing effective remedy for their enforcement if and when the rights are violated. A right

without a remedy is a legal conundrum of most grotesque kind and that **Article 32** confers one of the 'highly cherished' rights.

4.2.5 As an Advisory Body

Under Article 143, the Supreme Court has been designated as an advisory body to the President of India. Thus, apart from playing the role as an appellate court, federal court, guardian of the Constitution and guarantor of the fundamental rights, the Supreme Court has also been called upon to play the role of an advisory court. It is important to note that this feature is unique to Indian Constitution and even the American federal court or the House of Lords do not exercise such powers.

Article 143 of the Constitution which vests the Supreme Court with advisory jurisdiction is as follows:

143. Power of President to consult Supreme Court

1. *If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon*
2. *The President may, notwithstanding anything in the proviso to Article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon*

A clear analysis of this Article makes it clear that it vests a consultative function upon the Supreme Court. Such kind of power is not vested with any other democratic constitutions in the world. As far as India is concerned, this **Article 143** is not the first provision to vest such power, Under the Government of India Act, 1935 similar kind of power was given to the then highest court of India namely the Federal Court of India. In fact, the Clause (1) of the Article 143 is similar to the Clause (1) of Section 213(1) of the Government of India Act, 1935.

This power conferred upon the Supreme Court is not a formal power, rather it is a discretionary power given to the Court to give its opinion on any question of public importance that may be referred to it by the President. This can be justified from the fact that such advisory opinion rendered by the Supreme Court is not binding on the government.

4.3 INDEPENDENCE OF JUDICIARY

A post-colonial democracy has survived more than half a century due to the presence of a strong and independent judiciary. Its independence is safeguarded by the Constitution. The Constitutional framers envisaged a judiciary which was both independent and powerful.

Sir Krishna Swamy Ayyar, one of the eminent members of the Constituent Assembly has summarized the need to maintain the independence of Judiciary in the following words in one the Constituent Assembly debates:

> *While there can be no two opinions on the need for maintenance of judicial independence, both for the safeguarding of individual liberty and the proper working of the Constitution, it is also necessary to keep in view one important principle. The doctrine of Independence is not to be raised to the level of a dogma so as to*

enable the judiciary to function as a kind of super-Legislature or super-Executive. The judiciary is there to interpret the Constitution or adjudicate upon the rights between the parties concerned.

However, the eminent scholar warned that the judiciary as much as the legislature and executive depends for its effective functioning upon the cooperation of the other two pillars.

A closer scrutiny of the Constitutional Assembly Debates concerning the judicial provisions make it clear that the discussions were mainly concerned with the administrative aspects of the judicial system such as the tenure, salaries, allowances and retirement age of the judges and the mechanism of choosing the judges. But an in-depth analysis of these debates points us to the fact that the members were actually concerned with a desire to insulate the judiciary from forces within and outside of the government.

The following section will deal with the provision and features of the Constitution which explain the extent of independence of judiciary.

1. **Special mode of appointment of judges:** The previous section dealt elaborately with the appointment procedure and process of the judges. We are thus able to understand that why appointment process was kept free from interference by the Legislature and the Executive. It was carried out in order to maintain the independence of the Judiciary. We will now deal briefly with the landmark judgements that brought about the present system of collegium.
   - There has been a controversy as to the meaning of the expression 'Consultation' occurring in the Articles 124 and 217. Prior to 1993 there was a consensus that 'consultation' did not amount to 'concurrence'.
   - In the first *Judges Transfer case* that is in *S.P. Gupta vs. Union of India* (AIR 1982 SC 149), a seven-judge bench held that the ultimate power to appoint judges was vested with the Executive. The court held that 'consultation' meant full and *effective consultation.*
   - This principle was over-ruled subsequently in the *Supreme Court Advocates on Record Association vs. Union of India* ((1993) 4 SC 441) by a nine-judge bench with a majority 7-2 ruling. It held that in matter of appointment of judges of Supreme Court and High Courts, the President is bound to act in accordance with the opinion of the Chief Justice of India. The Chief Justice would tender his opinion after consulting with his senior most colleagues. The court further held that the appointment of Chief Justice of India was made on basis of seniority. Justice J.S. Verma who delivered the majority judgement along with Justices A.N. Ray, A.S. Anand and S.P. Bharucha made the following observation:

     > *... the executive element in the appointment process has been reduced to minimum and political influence is eliminated. It is for this reason that the word 'consultation' instead of 'concurrence' was used in the constitution, but that was done merely to indicate the absolute discretion was not given to any one, not even to Chief Justice of India as an individual, much less to the executive.*

Thus, Supreme Court had effectively declared that 'consultation' means 'concurrence'.

- In Re: Presidential Reference (AIR 1999 SC 1), a nine-judge bench held that the majority view in the AIR 1994 SC 268 case in that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice has primacy.

The opinion of the Chief Justice of India which has primacy in the matter of recommendations for appointment to the Supreme Court has to be formed in consultation with a '**collegium of judges**' and it observed that it is desirable that the collegium should consist of the Chief Justice of India and four senior most puisne judges of the Supreme Court.

2. **Security of tenure:** The judges of both higher and lower judiciary in India have a security of tenure. A judge of Supreme Court of India retires at the age of 65 while a judge of High Court retires at 62 years. They can only be removed by the way of impeachment. And the only two grounds on which they can be impeached are '*proved misbehaviour*' and '*incapacity*'. The process of impeachment is a complex one, the President can remove a judge only when an address is presented against the Judge by each house of the Parliament.

   For record it might be stated that no Judge of either High Court or Supreme Court has been impeached. An attempt was made and aborted when a sitting Judge of the Supreme Court was sought to be impeached, V. Ramaswamy on the grounds of 'proved misbehaviour' namely certain financial irregularities and excesses. But the impeachment motion was defeated in the Lok Sabha when the Congress party decided walk out. Another attempt was made in 2011 when Justice Soumitra Sen was sought to be impeached, but it fell through when the incumbent Judge tendered his resignation. Another possible impeachment failed against Justice P.D. Dinakaran who resigned as the Chief Justice of Sikkim High Court.
3. **Immunity in respect of Salaries and allowances of judges:** Under Articles 125 and 218 of the Constitution, the Supreme Court and the High Court Judges respectively are entitled to be paid salaries as determined by the Parliament. They cannot be changed by the Legislature except in case of emergency. Once appointed, every Judge is entitled to privileges and allowances and the same cannot be altered to their disadvantage. It is important to note that the salaries of the Judges are on higher scale than that of those of the members of the legislature and the executive.
4. **Administrative power of the Supreme Court and High Courts:** As per Articles 146 and 229, the Supreme Courts and the High Courts have been given authority to recruit their staff and frame other rules regarding their conditions of service. Hence, they enjoy administrative autonomy as regards to selection and appointment of non-judicial staff.
5. **Salaries drawn from consolidated fund:** The expenditure relating to the salaries and other allowances given to the judges are charged from consolidated fund of India and they cannot be subjected to vote by the legislature.
6. **Bar as to practice after retirement:** The Constitution itself debars the Judges of the Supreme Court after their retirement from pleading or appearing before any court or judicial authority in India. A similar but slightly different provision is imposed in respect to the Judges of High Court who can appear only before the Supreme Court or any other High Courts in which they did not serve as Judges.
7. **Bar as to discussion of conduct of judges:** No discussion shall take place either in the State assembly or in the Parliament regarding the conduct of any Judge of Supreme Court or of a High Court while discharging his duties. The only exception for this is given during the impeachment proceedings.

8. **Power to punish for contempt:** Under the Articles 149 and 215 the Constitution vests the Supreme Court and the High Court with the power to punish for contempt. Moreover, the Supreme Court is considered to be a Court of Record.

This is one of the most important features which uphold the independence of the judiciary. Contempt of Court essentially constitutes anything which tends to bring the administration of justice to disrespect or interfere with the process of administration of Justice. Such acts include scandalising the judge himself and obstructing the due course of justice. The power of contempt is so important that even legislature has no power to abridge it.

In *Delhi Judicial Service Association vs. State of Gujarat* ((1991) 4 SCC 406), the Supreme Court held that the Court has the power to punish a person for contempt of itself as well as the subordinate courts. Recently in *Re Vinay Chandra Misra* ((1995) 2 SCC 584) the Supreme Court held that the power under Article 129 and 142 cannot be curtailed by any statute and the purpose of such power is to uphold the majesty of law, the rule of law and the special function of the judiciary is to see whether the other two organs of the state function within the constitutional limitations.

From the above discussion it can be clearly seen that the framers of the Constitution envisaged a free and independent judiciary. They have also provided enough safe guards to enable the judiciary to work in an impartial atmosphere. This is one the reasons why the judiciary is bold and never hesitates to take action against the erring executive or the legislature.

In *C.RaviChandranIyer vs. Justice A.M. Bhattacharjee*((1995) 5 SCC 457) while dealing with the nature, role and meaning of independence of judiciary, Justice K. Ramaswamy speaking for the bench, held

……..in this ongoing complex adjudicatory process the role of judge is not merely to interpret the law but also to lay down new norms of law and to mould the law to suit the changing social economic scenario to make the ideals enshrined in the Constitution meaningful and reality. The society demands active judicial roles. Writs formerly were considered exceptional but now a routine. The Judge must act independently if he is to perform the function as expected of him and he must feel sure that such action of his will not lead to his downfall.

This concept of independence of judiciary is now considered to be one of the basic features of the Constitution. The Constitution provides wide powers and enough grants to make the judiciary a completely independent entity. Almost every Constitution around the world strives to create an independent and impartial judiciary, and they include such provisions to ensure that the same is continued and practiced. Eminent Jurist Nani A Palkhivala declared that independence of judiciary is the very heart of a republic. The foundation of the democracy, the source of its continued existence, the condition for its growth and the hope for its welfare – everything lie in that great institution, an independent judiciary.

4.4 ISSUES IN JUDICIAL APPOINTMENTS

The method of appointment of judges of the Chief Justice of Supreme Courts, High Courts have been laid down in the Constitution. This has been provided in Articles 124(2) and 217(1) of the Constitution.

Art. 124(2) reads:

'Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted…' and

Art. 217(1) reads:

'*Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court…'*

These constitutional provisions were incorporated after several meaningful debates on the basic issue of judicial independence. After a long debate the assembly adopted the system by which the President would appoint the judges with mandatory consultation with the Chief Justice of India. This consultation with the Chief Justice was done in order to check the politically motivated selections in the appointment process.

There has been two different but crucial phases in relation to the judicial appointments

1. First: the phase of appointments by the Executive – 1950–1993.
2. Second: the phase of appointments by the collegium – 1993–present.

First Phase

This was considered to be true intention of the constitutional makers that the executive be involved in the appointment process of the judges. Independence of Judiciary was ensured by securing their tenure and creating a tough impeachment process of removal of the judges. The judges as per the Constitution were not given free-hand or an exclusive privilege to make their own appointments. This phase carried on smoothly until the period of emergency. This emergency period saw several turn-arounds in various sections, and one area which got severely affected was the judiciary.

- The seniority of appointment was by-passed and a judge because of his political connections got appointed as the Chief Justice of Supreme Court.
- Several other subsequent judgements were taken in favour of the government. This severely dented the concept of independence of judiciary. Judiciary thus became a handmaiden of the government.
- Such a practice was resented and voice rose from several quarters, especially from the judiciary to rectify such a practice.
- In light of these developments, in order to maintain independence and to create an appointment which was free from political motivations the Supreme Court between the years 1982–1999, the issue of appointment was examined and reinterpreted (*S.P. Gupta* vs. *Union of India*, AIR 1982, SC 149; S.C. Advocates on Record Association *vs.* Union of India, AIR 1994 SC 268; *In re*: Special Reference, AIR 1999 SC 1.).

Since then, a system of collegium, consisting of Chief Justice of India and other senior most judges of the Supreme Court, gave recommendations for appointment of judges to Supreme Court and High Court, to the President.

Second Phase

At present after the striking down of the National Judicial Appointments Commission Act, the Collegium system of appointment is followed. Nowhere in the world there is a system of appointment of judges by the judges themselves. In this system the executive acts as a mere conduit as rest of the consultation, approval, and acceptance is taken by the judiciary and executives are not involved in any of such process.

The below is the appointment process carried out in various countries, and from this we can clearly understand that the system of appointments by collegium is unique to our country.

Appointment of judges to the highest court in different jurisdictions

Country	Method of Appointment to the Highest Court	Who is Involved in Making the Appointments
UK	Supreme Court judges are appointed by a five-person selection commission.	It consists of the Supreme Court President, his deputy, and one member each appointed by the JACs of England, Scotland and Northern Ireland. (The JACs comprise lay persons, members of the judiciary and the Bar and make appointments of judges of lower courts.)
Canada	Appointments are made by the Governor in Council.	A selection panel comprising five MPs (from the government and the opposition) reviews list of nominees and submits 3 names to the Prime Minister.
USA	Appointments are made by the President.	Supreme Court Justices are nominated by the President and confirmed by the United States Senate.
Germany	Appointments are made by election.	Half the members of the Federal Constitutional Court are elected by the executive and half by the legislature.
France	Appointments are made by the President.	President receives proposals for appointments from ConseilSuperieur de la Magistrature.

Appointments by the Collegium

The memorandum of procedure for appointing the Judges of Supreme Court of India is given in the following list. And from this procedure we can understand how the system of collegium operates.

1. Whenever a vacancy is expected to arise in the office of a Judge of the Supreme Court, the Chief Justice of India will initiate proposal and forward his recommendation to the Union Minister of Law, Justice and Company Affairs to fill up the vacancy.
2. The opinion of the Chief Justice of India for appointment of a Judge of the Supreme Court should be formed in consultation with a **collegium of the four senior-most puisne Judges** of the Supreme Court. If the successor Chief Justice of India is not one of the four senior-most puisne Judges, he would be made part of the collegium as he should have a hand in selection of Judges who will function during his term as Chief Justice of India.
3. The Chief Justice of India would **ascertain the views** of the senior-most Judge in the Supreme Court, who hails from the High Court from where the person recommended

comes, but if he does not have any knowledge of his merits and demerits, the next senior most Judge in the Supreme Court from that High Court should be consulted.

4. The **opinion of members of the collegium in respect of each of the recommendations** as well as the senior-most judge in the Supreme Court from the High Court, from which a prospective candidate comes, **would be made in writing** and the Chief Justice of India, in all cases, must transmit his opinion as also the opinion of all concerned to the Government of India as part of record. If the Chief Justice of India or the other members of the Collegium elicit views, particularly those from the non-Judges, the consultation need not be in writing but he, who elicits the opinion, should make a memorandum thereof and its substance in general terms which should be conveyed to the Government of India.
5. After receipt of the final recommendation of the Chief Justice of India, the Union Minister of Law, Justice and Company Affairs will put up the **recommendations to the Prime Minister who will advise the President in the matter of appointment**.

The following is the memorandum of procedure for appointment of Chief Justice of High Court and of other Judges of High Court. And it is carried out on similar line of appointment of the judges of the Supreme Court.

1. Initiation of the proposal for the appointment of Chief Justice of a High Court would be by the Chief Justice of India.
2. The Chief Justice of India would send his recommendation for the appointment of a puisne Judge of the High Court as Chief Justice of that High Court or of another High Court, in **consultation with the two senior-most Judges of the Supreme Court**.
3. After receipt of the recommendation of the Chief Justice of India, the Union Minister of Law, Justice and Company Affairs would obtain **the views of the concerned State Government**. After receipt of the views of the State Government, the Union Minister of Law, Justice and Company Affairs, **will submit proposals to the Prime Minister, who will then advise the President as to the selection**.
4. The proposal for appointment of a Judge of a High Court shall be **initiated by the Chief Justice of the High Court**. However, if the Chief Minister desires to **recommend the name of any person he should forward the same to the Chief Justice for his consideration**.
5. The Union Minister of Law, Justice and Company Affairs would consider the recommendations in the light of such other reports as may be available to the Government in respect of the names under consideration. The complete material would then be forwarded to **the Chief Justice of India for his advice**. The Chief Justice of India would, in **consultation with the two senior-most judges of the Supreme Court, form his opinion in regard to a person to be recommended for appointment** to the High Court. The Chief Justice of India and the **collegium of two Judges** of the Supreme Court would take into account the views of the Chief Justice of the High Court and of those Judges of the High Court who have been consulted by the Chief Justice as well as views of those Judges in the Supreme Court who are conversant with the affairs of that High Court.
6. After their consultations, the Chief Justice of India **will in course of 4 weeks send his recommendation** to the Union Minister of Law, Justice and Company Affairs.

Consultation by the Chief Justice of India with his colleagues **should be in writing** and all such exchange of correspondence with his colleagues would be sent by the Chief Justice of India to the Union Minister of Law, Justice and Company Affairs. Once the names have been considered and recommended by the Chief Justice of India, they should not be referred back to the State Constitutional authorities even if a change takes place in the incumbency of any post.

7. The Union Minister of Law, Justice and Company Affairs would then put up as early as possible, preferably, within 3 weeks, the recommendation or the Chief Justice of India to the Prime Minister who will advise the President in the matter of appointment.

Drawbacks in Collegium System

As seen from the above memorandum of procedure, the appointments are devoid of any consultation with the executive and all decisions are solely taken up by the higher echelons of the judiciary. Some of the major drawbacks of this system are as follows:

1. There prevails secrecy in the Collegiums meetings as the minutes of collegium are not being recorded which undermines the plurality opinion of the judges in the collegium. It brings out **manufactured consensus** on the list of names of appointees and transfers brought in by the Chief Justice of India.
2. The Chief Justice of India is having more say in the collegium there by this big brother attitude is reflected in not disclosing the Intelligence Bureau (IB) report of candidates to the fellow members of the collegium claiming that it is his discretion in revealing the reports.
3. The candidates rejected by the collegium on the basis of adverse report by the IB for the post of Supreme Court Judge continue to serve their present position as Judge of High Court or as advocates of High Courts. It is due to the non-disclosure of the adverse report to fellow judges (or) even to the public.
4. Those who opt for public must be prepared for certain degree of public scrutiny. Reasons for elevation and non-elevation as a judge therefore can be disclosed.
5. The dissent within the collegium is being supposed on many instances which violates the judgement provided by the **Third Judges case** which says the recommendation must be based on the decision of Chief Justice of India along with the senior-most judges.
6. The Collegium system lacks performance audit of the candidates to be elevated as the judges of Supreme Court.
7. Absence of separate secretariat for judicial appointment which is being done by the Judges themselves consumes the time of judicial activity which is also a prime reason for piling up of cases in the judicial backyard.
8. The provision of All India Judicial Service is included in the 42nd Amendment Act of 1976, but no such law has been made so far due to the opposition from High Court Chief Justices who label it as an infringement of their rights.
9. Other defects in collegium are as follows
   - Chief Justice of India acts as initiator as well as appointer
   - Increasing influence of Bar Council
   - Competence of judges is not measured only seniority prevails

- Increasing workload
- Utmost secrecy. The answers for why someone is appointed and why one is rejected are not given out.

Requirement of Independent Judicial Appointments Commission

There is presently a need for an independent judicial appointments commission because of the following reasons:

- It reduces the work burden of the judges in appointment.
- To bring transparent, fair and merit based selection.
- To bring public confidence and promote diversity.
- Reduce politicisation in appointments.
- Timely filling of vacancy as and when it arises.
- Criteria-based selection.
- It is been constantly recommended by various law commissions, National Commission on Review of Working of Constitution.

The recommendations made by various commissions and bodies in line to appointment to the Judiciary can be seen from the below table. It gives proper description of the composition of the body which is to make recommendation of the appointment.

Recommendatory Body	Suggested Composition
2nd Administrative Reforms Commission (2007)	**Judiciary**: Chief Justice of India; [For High Court judges: Chief Justice of the relevant High Court of that state] **Executive**: Vice-President (Chairperson), Prime Minister, Law Minister, [For High Court judges: Includes Chief Minister of the state] **Legislature**: Speaker of Lok Sabha, Leaders of Opposition from both Houses of Parliament.
National Advisory Council (2005)	**Judiciary**: Chief Justice of India; [For High Court judges: Chief Justice of the relevant High Court of that state] **Executive**: Vice-President (Chairman), Prime Minister (or nominee), Law Minister, [For High Court judges: Includes Chief Minister of the state] **Legislature**: Speaker of Lok Sabha, Leader of Opposition from both Houses of Parliament.
National Commission on Review of Working of Constitution (2002)	**Judiciary**: Chief Justice of India (Chairman), two senior most Supreme Court judges **Executive**: Union Law Minister **Legislature**: No representative **Other**: one eminent person

Law Commission (1987)	**Judiciary**: Chief Justice of India (Chairman), three senior-most SC judges, immediate predecessor of the Chief Justice, three senior most Chief Justices of High Courts, [For High Court judges: Chief Justice of the relevant High Court of that state] **Executive**: Law Minister, Attorney General of India, [For High Court judges: Includes Chief Minister of the state] **Legislature**: No representative **Other**: One Law academic

National Judicial Appointments Commission

This was the recently proposed body which would have been responsible for both appointments and transfer of judges in higher judiciary. This commission was setup by amending the Constitution through 99th constitution amendment passed by the Lok Sabha as the Constitution (Ninety-Ninth Amendment) Act, 2014. This commission would have replaced the collegium system of appointment as propounded by the Supreme Court. But this constitutional amendment which was also ratified by 16 states was struck down by the Supreme Court bench by a 4:1 majority as unconstitutional.

This was struck down as unconstitutional because of the following reasons:

1. This commission was considered as an executive inroad in judicial appointment which violated the Article 50, which favours separation of Judiciary and Executive.
2. Section 6(6) of NJAC says, if any two members object, the recommendation is nullified by which a veto power provided to the executive.
3. The role of eminent person is questioned as no specific qualification is provided and a greater say for executive in his appointment. Section 124 (D) in the NJAC Act, talks about such eminent person.
4. Section 5(1) of NJAC Act says that the recommendation for senior most judge of the Supreme Court as the Chief Justice if he was considered fit to hold the office. The bench noted that the Act carried no definition of 'fitness'.
5. The inclusion of law minister in the composition of NJAC militated against judicial independence.

The ongoing tussle between the judiciary and the executive for their involvement in the judicial appointment becomes baseless when a completely apolitical and autonomous body like in England's Judicial Appointments Commission is given importance.

Judicial Appointments Commission of United Kingdom has a set of reliable criteria for appointment of Judges which includes candidate's intellectual capacity, his ability to understand, communication skill, leadership and efficiency. These qualities are identified by the Judicial Appointments Commission where more than half members are selected on the basis of merit and open competition.

In similar way, National Judicial Appointments Commission could also include members based on merit and open competition rather than giving importance to the seniority of their positions in the Judiciary and Executive.

Indian Judiciary lacks a constitutional code of conduct as like in United States of America which is used to measure the performance of judge where by appointment to the higher office by promotion is justified.

Transparency can be pushed further by requesting the minutes of meeting to be submitted to Parliamentary Standing Committee by which reasons for appointment and rejection is conveyed to the people's representatives.

4.5 CONCEPTUALISING RELEVANT TERMS AND EXPRESSIONS

The following are some of the important terms which are relevant to understand judiciary and constitutional laws. These terms are discussed in brief hereunder.

4.5.1 Judicial Review

It denotes the power given to higher judiciary to test the validity of any legislation or any other executive action taken by the government. This power is inherent and given by the Constitution. Hence, judiciary can strike down any legislation which goes beyond or violates the provisions of the Constitution. This is the biggest check and all laws and legislations, rules which are covered under Article 12 must satisfy the test of constitutionality, else it is liable to be struck down by judiciary through the process of review. This power is given both to the Supreme Courts and the High Courts.

4.5.2 Judicial Power

It is an expression having widest meaning, it denotes the power exercised by the judiciary as an organ of the State. And this power varies according to the type of system in which it is present, that is adversarial or inquisitorial system of Justice. As far as India is concerned, the Judiciary is given power under the Constitution. It is made independent and it is one of the fundamental pillars of democracy. It keeps check on the other organs of the state thereby upholding the principles of the Constitution.

4.5.3 Judicial Policy Making

This is associated with the related terms such as Judicial Activism, Judicial Creativity and Judicial Legislation. These all terms mean that Judiciary is not simply an organ to interpret law and read the rules and make the other organs of state abide the principles of the Constitution. This means that they are also law makers. Thus, Judiciary do not merely declare the law, they also create the law.

- As far as India is concerned, the courts have interpreted the laws giving prominence to the rights of the individual and considering the state to be a welfare state and the courts to be the guardians of the Constitution.
- This concept of judicial legislation by the Supreme Courts and the High Courts has remained a controversial issue even today.
- Only in certain exceptional cases, the Higher Judiciary has resorted to the judicial legislation by framing rules and regulations which in normal course had to be carried out by the legislature.
- These include guidelines in the case of sexual harassment of woman at work place (*Visakha vs. State of Rajasthan*, (1997) 6 SCC 241), guidelines for adoption of minor children by foreign parents *in Lakshmi Kant Pandey vs. Union of India* ((1984) 2 SCC 244),

guidelines in *University of Kerala vs. Council of Principals of Colleges*((2009) 16 SCC 712) where steps to be taken by the educational institutions to contain the menace of ragging was suggested.

In *Raj Deo Sharma vs. State of Bihar* ((1998) 7 SCC 507) and *Raj Deo Sharma (II) vs. State of Bihar* ((1999) 7 SCC 704), the Supreme Court laid down guidelines for speedy disposal of criminal cases.

These abovementioned measures were not norms and courts in certain instances has frowned upon legislation by the Judiciary. In *Common Cause vs. Union of India* ((2008) 5 SCC 511), the Supreme Court refused to provide guidelines to regulate traffic as this would fall under the domain of the legislature. Similarly in *P. Rama Chandra Rao vs. State of Karnataka* ((2002) 4 SCC 578) the courts held that giving directions of a legislative nature is not function of the judiciary.

- The people opposing this concept say that judicial legislation is in violation of the principle of separation of powers and that it does not represent the will of the people and also that courts are not fully equipped to legislate.
- These arguments cannot simply be brushed aside.
- The problem is the legislature is taking time and there is delay in the political process in taking decisions and actions, hence there is no option but the judiciary to intervene and make legislation.
- The legislature was functioning effectively then all these issues would have been dealt earlier through legislations and laws, since there is lacunae, the judiciary through its own inherent power of legislation is filling up these gaps.

This can be seen from the fact that even after several years after framing on sexual harassment the legislature has not taken steps to legislate the same, hence it has to be agreed that such judicial legislation was a step in the right direction.

4.5.4 Judicial Activism

This term describes the assertive nature of use of judicial power. The extreme model of judicial activism is when the court begins to be intrusive and dominates all the institutions of the government. It is otherwise been termed as judicial supremacy, judicial absolutism, judicial legislation and judicial policy making. Some of the judges and advocates think that judicial activism is only the extension of the powers under judicial review and not an extraordinary power. However, for others this term means encroachment of the court in the powers of legislative and executive field.

4.5.5 Judicial Restraint

It is anti-thesis to judicial activism. And thus it denotes the self-control exhibited by the judiciary. The Encyclopaedia of American Constitution describes the judicial restraint as follows, the judicial restraint of a court is that it decides virtually nothing at all; it strains to find reason why it lacks jurisdiction, it avows deference to the superiority of other departments or agencies in construing the law; it finds endless reasons why the constitutionality of laws cannot be examined. It is a model where the government cannot take recourse to courts to enforce principles of constitution. And courts also do not involve themselves in such acts.

4.5.6 Constitutionalism

It has both descriptive and prescriptive connotations. Descriptively, it refers mainly to the historical struggle for the constitutional recognition of the rights, freedom and privileges of the people. Prescriptively it incorporates those features of the government which are seen as important elements of the constitution. Simply put, constitutionalism is the spirit of the Constitution which commands respect from both the ruler and the ruled.

4.5.7 Separation of Powers

This principle was propounded and popularised by the French political analyst, Montesquieu. It represents assigning of the three namely legislative, executive and the judicial powers in three separate organs of the government that is in the Executive, the Legislature and the Judiciary. It provides that each of these organs is separate and distinct functionally and structurally and there is no overlapping between them.

But in the present times, this concept has been substituted by the more flexible theory of Checks and Balances. This concept also means that one organ of the government should not perform or exercise the function of the other. The effective and strict implementation of this doctrine is not possible in the present era because of the growth of delegated legislation and administrative tribunals.

4.5.8 Public Interest Litigation

It is a new concept which denotes a new use of judicial power. To provide common man, the socially and economically disadvantaged section of the society, easy access to justice. It also denotes a type of representative litigation which is called the 'Social action litigation'. This concept has been induced and led by the Supreme Court of India since the early 1980s. This Public interest litigation had opened the doors of Supreme Court to the ordinary citizen. Any matter of public importance could now be taken up to the Supreme Court. And by way of this process the Court had delivered several landmark verdicts which had paved way for development of social consciousness of the people.

4.6 MEANING OF JUDICIAL REVIEW

As per the Encyclopaedia of American Constitution, the Judicial Review is defined as the power of courts to consider the constitutionality of acts of other organs of government when the issue of constitutionality is germane to the disposition of law suits properly pending before the court. This power to consider constitutionality in appropriate cases included the courts authority to refuse to enforce, and in effect invalidate, governmental acts they find to be unconstitutional.

The term acquired different meanings in various countries. And its origin can be traced to United Kingdom which has no written Constitution. But this concept has been firmly established in United States of America having a written Constitution and a federal polity.

4.6.1 Judicial Review in United Kingdom

The foundation of the concept of judicial review can be traced to the basis of natural law, and the understanding that the human conduct is guided by fundamental laws which have natural or divine origin and sanction. In the famous *Dr. Bonham's* case (1610) Chief Justice Coke stated that

'*when an act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void*'.

The meaning of judicial as it is understood now to strike down the unconstitutional legislations failed to establish in England because of its historical conflict between the royal prerogative on one hand and the Parliament and the people on the other. Finally the people stood victorious. It also meant that the Parliament was also victorious as it was the representative of the people. This strengthened and firmed the concept of parliamentary sovereignty as propounded by A.V. Dicey. The Parliament thus became supreme.

Hence, Dicey states that '*English judges do not claim or exercise any power to repeal any statue*'. Moreover, Dicey proceeds to state that judicial law making is '*in short, subordinate legislation*' because '*acts of Parliament may override and constantly do override the law of the judges*'.

Hence, the courts in England have exercised only a limited power of judicial review in the sense that they strike down the 'subordinate legislation' or executive action if they are 'ultra vires' of the parent Acts under which they are made. But the English Courts and the House of Lords do not have the power to declare any act of the Parliament to be null and void on any ground. The absence of a written constitution and the legal recognition of doctrine of Parliamentary Sovereignty have restricted the development of a full-fledged concept of judicial review in England.

4.6.2 Judicial Review in United States of America

Unlike in United Kingdom the United States had a written Constitution and a federal polity. And this provided the fertile ground of development of judicial review. Alexander Hamilton one of the founding fathers of the American Constitution argued that '*the limited constitution can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution, void*'.

But it was Chief Justice John Marshall who propounded the modern doctrine of judicial review in the *Marbury vs. Madison* in 1803. Marshall demonstrated in this classic case that the court must have power to invalidate the Acts of the Congress when it is in violation of the provisions of the Constitution. Marshall started from the understanding that the government of United States created by the Constitution is a limited government and that a '*legislative act, contrary to the Constitution, is not law*'. Marshall declared:

> *It is emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules govern the case; this is of the very essence of judicial duty.*

He also declared that as per all written constitutions, a law repugnant to the Constitution is void and the courts are bound by such an understanding.

The analysis of this landmark judgement given by Marshall makes it clear that the learned Chief Justice had founded doctrine of judicial review on the following basic principles:

1. The Constitution is the Supreme law of the land, it is '*fundamental and paramount law of the nation*'.

2. In the cases of written Constitution especially of federal character, the Courts have to play the role of an arbiter to maintain the balance between various constituent elements of the federating units with respect to the distribution of legislative powers.
3. The power of judicial review is inherent in a federal constitution though it is not explicitly mentioned.
4. It is emphatically the province and duty of the judicial department to say what the law is.
5. The President of the country and the Judges of the Supreme Court have taken oath to uphold the Constitution.

Over a period of time this concept of Judicial review has become the corner stone of the American Constitution. Now this power of judicial review is now come to be exercised by federal as well as by the Supreme Court to test the validity of the legislations made.

Judicial review in the interest of federalism has played a vital role in United States. This is viewed as one of the important functions of judicial review. It is importantly judicially enforcing the principles of the Constitution and recognising that Constitution is a law rather than a policy document. From the beginning made in the *Marbury vs. Madison* the Courts have now come a long way, and at present they exert a dominant role while interpreting the Constitution. This also does not mean that Supreme Court is above of all and immune from criticism.

The courts are still subject to political restraints emanating from the Constitution. The Congress can still impeach the judges, can able to restrict the jurisdiction of the federal courts, and can even amend the Constitution in order to overrun a ruling by the court. Despite these checks the role of Supreme Court has out grown them and has become the ultimate power in the country. It can be said that scarcely any question arises in United States which does not become, sooner or later, a subject matter of judicial debate.

4.6.3 Judicial Review in India

The power of judicial review is not explicitly mentioned in the Indian Constitution. But this power of judicial review of Supreme Court can be traceable to Article 13 (1) and (2) and Article 32 (1) and of High Courts to Article 226. In *State of Madras vs. V.G.Row* (AIR 1952 SC 196) Chief Justice Patanjali Shastri observed: '*our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution. This is specially true as regards the fundamental rights as to which the court has been assigned the role of sentinel on the Qui Vive*'.

In *Kesavananda Bharati vs. State of Kerala* (AIR 1973 SC 1899), Khanna. J observed: '*If the provisions of the statute are found to be violative of any Article of the Constitution which is touchstone of the validity of all laws, Supreme Court and the High Courts are competent to strike down the said provisions*'.

Article 13 which is under Part III of the Constitution dealing with the fundamental rights provides two clauses (1) and (2) which reads as follows:

1. *All laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provision of this part, shall, to the extent of such inconsistency, be void.*
2. *The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause, to the extent of the contravention, be void.*

Article 32 (1) provides

> *The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.*

Article 226 (1) confers powers on different High Courts the power to enforce

Any of the rights conferred by part III and for any other purpose.

Thus, it can be clearly seen that powers have been conferred with the courts to declare any law made by the legislature as null and void if they are found to be violative of the provisions in Part III that is the fundamental rights. But there are no provisions in the Constitution to provide for when laws or rules are in violation of other Articles and Parts of the Constitution. But reading of Article 226, we can clearly come to understand that the High Courts have been granted power to strike down laws contravening laws not just in violation of provisions of Part III but also for 'any other purpose'. Hence, power of High Court extends to other provisions of the Constitution as well. Thus, from the above the Supreme Court's power of judicial review while exercising its original jurisdiction under the Article 32 is confined to only the Part III whereas in its appellate jurisdiction, the Supreme Court can exercise this power over the entire Constitution.

This power of Supreme Court can be traced to the written Constitution in a federal polity. The unconstitutionality of a law is same whether it violates Part III which are specially protected by Articles 13,32 and 226 or whether it violates rest of the Constitution which are not specially protected with regard to the Supreme Court. Hence, tracing the power of judicial review to Articles 13 and 32 will be an incomplete effort.

In *A.K. Gopalan vs. State of Madras* (AIR 1950 SC 27), Kania C.J. stated that the Article 13 was inserted in Part-III *ex abundantecautela* and that '*in India it is the constitution that is Supreme and that a statute law to be valid, must be in all conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not*'.

As far as India is concerned, the judicial review comprises of the following three aspects:

1. Judicial review of legislative action
2. Judicial review of judicial decision
3. Judicial review of administrative action

The Supreme Court has always held that the power of Judicial review under Article 32 and 226 to scrutinise the legislative action, even the constitutional provisions and amendments to be subjected to verification by the judiciary, to be integral to our Constitutional scheme.

In a landmark judgement having far reaching consequence, a seven-judge Bench of Supreme Court has held that even the administrative Tribunals established under Articles 323-A or 323-B of the Constitution can exercise the power of judicial review like that of Supreme Court or High Court, even though their role in this regard is supplementary. Thus, sweeping powers are vested with the Supreme Courts, High Courts and the Tribunals due to the provisions of the Constitution and also because of the judicial innovations.

4.7 JUDICIAL ACTIVISM IN INDIA

It is difficult to trace the origin of judicial activism in India. Since its establishment the Judiciary has come to be regarded as independent and separate entity of the government. The activism can be traced back even prior to the Government of India Act 1935. Some of the judges of the High Courts established under the Indian High Courts Act, 1861 exhibited flashes of activism. Back in 1893, Justice Mahmood of Allahabad High Court delivered a dissenting judgement which sowed the seed of activism in India.

The Judicial activism can be seen from the decisions and directions given by the Supreme Court. This trend can be seen in the following list:

1. The concept of 'basic structure' was introduced in 1973, whereby even the Constitutional amendment is liable to be struck down if it changes any of the basic structure of the Constitution. This kind of judicial control over the Constitution has been seen only in India (*Kesavananda Bharati vs. State of Kerala*, AIR 1973 SC 1463).
2. Even the privileges of the legislators are not absolute and they have now been brought under the purview of the courts *(Re Keshav Singh*, AIR 1965 SC 745).
3. The power of judicial review exercised by the Supreme Courts and the High Courts has not been recognised to be unchangeable 'basic structure of the constitution' (*Indira Nehru Gandhi vs. Raj Narain*, (1975) SCC Supp. 1).
4. The entire governmental administration is corrected by the Supreme Court at the apex and the other 21 High Courts under it.
5. The concept of 'state' has not been given wider meaning to include all public and quasi-public authorities. This was made possible so by various successive judgements by the Supreme Court.
6. The concept of *locus Standi* has been widened by the Courts in case of public interest litigations.
7. The Supreme Court has often resorted to make Judicial Legislation by virtue of the power given under Article 141 of the Constitution to fill the legislative lacunae (*Vishaka vs. State of Rajasthan*, (1997) 6 SCC 241).

Hence, it is clear that a clear origin of judicial activism cannot be found after the independence. Analysing the various judgements and directions given by the Supreme Court, we can come to understand that there have been flashes of activism since 1950s till 1980s and since 1980s there has been consistency in such decisions by the court. Another important aspect is that there is no uniformity in areas where such decisions have been taken. The decisions were taken in varied areas such as interpreting the Constitution, guarding the fundamental rights of the citizens, strengthening of the concept of judicial review, expanding the scope of *locus standi* in cases of public interest litigation, expanding the meaning of Article 21 and restructuring certain directive principles as fundamental rights.

4.7.1 Judicial Activism Definition

There is no precise definition of judicial activism which is accepted by all. But the widely accepted view is that it is related to problems and processes of political development in the country. Hence, judicial activism deals with the political role played by the judiciary, like its counterparts in other branches of the government, that is, the legislature and the executive.

- Judicial activism is the exercise of the judicial power in order to fundamentally alter the power relations in the state which is governed by the ruling elites.
- It is also the use to such power to infuse and enforce counter-ideologies which enable to recodify the power relations among the institutions of governance.
- The justification of such activism stems from the near collapse of the responsible government and the mounting pressure on the judiciary to step in to aid which forced it to react by venturing and making political and policy-making judgements.

- The terms 'judicial activism' and 'judicial restraint' are used to describe the assertive nature of the courts. They are two extremes in the spectrum of judicial power.
- The most extreme form of activism would be when the courts are so intrusive that it virtually dominates all spheres of the government. These above mentioned terms are generally used as descriptive approach to understand whether the court is exhibiting activism or restraint in particular cases.
- The definitions to these terms come from personal or professional view of the 'right' role of the court.
- Hence, the courts are either condemned or commended for their 'right' role in such cases.
- As far as United States is considered, individual judges have interpreted the Constitution which is highly ambiguous and based on their personal understandings. Hence, individual judges have had different understanding of what is 'proper' or 'right' judicial role.
- The term judicial activism can be equated with, judicial supremacy, judicial absolutism, judicial imperialism and judicial anarchy. This is opposed to the term 'restraint' which is popularly called 'judicial conservatism'.

The understanding of an activist or a restraintivist judges are based on definitions of groups of people who define them. Some of the major groups of people who participate in such process are mainly the 'managerial' class of bureaucrats, the set of advocates, the 'victims' which include the police and other government machinery and finally the 'beneficiaries' the common man, students, disadvantaged sections who benefit from such actions of the Court.

Thus, the definition is based on the understanding of each group of people, hence we cannot come to a concrete definition of what is judicial activism. And it is impossible for the Judge to satisfy all the groups therefore there is no uniformity in calling what activism is. It thus means different things to different people. It can be understood to be the dynamism of the judges, some consider it to be the creativity of the judiciary and some other as bringing 'social or cultural' revolution through judiciary. Though such concept of revolution seems farfetched, it does aim in bringing change in the society.

4.7.2 Reasons for Judicial Activism

The following are some of the important reasons which make the courts to be active while discharging their function as per the Constitution.

1. **Near Collapse of Responsible Government:** When the two branches of the government that is the legislature and executive fail to perform there will be a near collapse of the responsible government. Responsible government is said to be the hallmark and basis of a successful democracy and constitutionalism. And its collapse necessitates immediate and drastic action. When the legislature fails to enact legislations to suit the changing scenarios, when the administration fails to function sincerely and with integrity and honesty, all this would lead to collapse of confidence of people on the Constitution and the government. In such extraordinary circumstances, the judiciary may step in the shoes of legislature and executive and take upon the functions which usually come under their purview. Thus, the result is judicial legislation and the government by the judiciary.

2. **Pressure on judiciary to step in aid:** Presently it has been clearly established that the courts cannot be a silent spectator when the fundamental rights of the citizens are being violated either by the government or by any other third party. The judges being the members of the society feel that they too have a role to play in ameliorating the worsening conditions of the people in the country. Moreover, people in our country are infatuated with salvation by the judiciary. Thus, it has become natural for the citizens to look up to the judiciary to step in for their aid and help. Thus, this creates tremendous pressure on the judiciary to do something for the suffering masses. And therefore this may lead the judiciary to take up an activist role.
3. **Judicial enthusiasm to participate in social reform and change:** The judges who are from the society cannot be silent spectators when the times and things around them are changing. As persons who are involved in interpreting and applying law which is a dynamic concept, the judges themselves would like to involve in the social reforms process happening due to changing times. Judiciary has thus become an active participant in the social reform process. It has thus encouraged and also initiated various instruments such as the Public Interest Litigation (PIL), also called the Social Action Litigation. It such cases the courts have disregarded the usual and necessary procedures and forms and therefore have assumed the functions of investigator, counsellor and monitor of the functions of the administration.

   This has thus led to relaxation of procedural and customary rules. And it invokes the jurisdiction of the courts in a far and wide manner. And thus when the courts themselves initiate action to correct the social ills, such acts become indistinguishable from that of commissioners of grievances.
4. **Legislative vacuum left open:** In administrative law there is a saying that even when the Parliament and the state legislature work every day for 365 days and enact legislations on every such day they will not be enough to address the changing needs of the society. Even though there exists wide plethora of legislations, there are still large areas which are still left uncovered by the legislations. This may be because of inadvertence, lack of coverage of the issues, absence or indifference of the legislature.

   Thus, when the competent legislature fails to act or perform their legitimate role to meet the changing needs of the society, the court thus indulges in judicial legislation. It has to be understood in terms of statutory interpretation. The courts have thus acted to fill the void created by relinquishment of legislative responsibility.
5. **The Constitutional Scheme:** The India Constitution contains a number of provisions which provide wide scope for judiciary to assert itself. Under Article 13, the judiciary is empowered to declare any law or legislation as void if it is in violation of Part III of the Constitution. Under Article 32, any aggrieved citizen may approach the Supreme Court for enforcement of the fundamental rights. The right under this Article has been made a fundamental right under the title 'right to constitutional remedies'. Thus, the Supreme Court is designated as the guardian of the fundamental rights of the citizens and while fulfilling that role it indulges in judicial legislation making and judicial government.

   Under Article 131, the Supreme Court is vested with the power to uphold the federal principle. The Supreme Court is also the highest appellate court and it hears appeals in all matters relating to Civil, Criminal and Constitution. The Supreme Court is also given advisory powers to advice the President under Article 143 on any

question of law or fact, referred to it. The Supreme Court also has the rule making power under Articles 142 and 145. It has the power to punish for contempt under Article 129.

Thus, it is clear that judiciary in India especially the Supreme Court in particular has been given vast powers under the Constitution and therefore it has enough scope to be active and uphold the fundamental principle of constitutionalism.

6. **Authority to make final declaration as to validity of a law:** Supreme Court is the final arbiter of validity of the laws. Under Article 141 the Supreme Court has the power to declare any law and such declaration is binding on all courts in India except the Supreme Court itself.

In *Indira Sawney vs. Union of India* (AIR 2000 SC 498) a three-judge Bench encountered a peculiar situation where one of its directions in the *Mandal Commission Judgement* (AIR 1993 SC 477) to identify the creamy layer in order to exclude them from the reservation process, in the case the Kerala government enacted a legislation to give retrospective effect that there are no creamy layer in Kerala. The Court found this unconstitutional and took a serious note of action of the Kerala government and initiated contempt proceedings against it.

The Supreme Court being the final authority to decide the validity of a law gives it wide discretionary powers without any accountability thereby creating ground for activism by the judiciary.

7. **Role of Judiciary as guardian of fundamental rights:** The Constitution has designated the higher judiciary as the guardian of fundamental rights of the citizens.

As per Articles 13, 32 and 226 of the Constitution, it is the duty of the courts to uphold the fundamental rights of the citizens of the country.

   a. As per Article 13, it empowers the Supreme Court and High Courts to declare any law as void if it is in violation of any fundamental right.
   b. Under Article 32, the Supreme Court can issue writ, order or direction to any person or authority violating the fundamental rights of the citizens.
   c. This approach to Supreme Court has been made a fundamental right under the Constitution as per Articles 32 to 35.
   d. Under Article 226 the High Courts have been given far and wider power to enforce the fundamental or other rights of the citizens.
   e. All these powers have been vested with the courts which enable them to exercise vast powers of judicial review with respect of any legislative, quasi-legislative, executive, quasi-judicial or other actions of the government concerned.

This is the role which has been effectively carried on by the courts. The result therefore is the growth and development of judicial activism.

8. **Public confidence on the Judiciary:** The most important and potent weapon in hands of the judiciary is the confidence and respect it commands from the people. It also inspires faith in the mind of the people. It tries to keep the scales in balance in any dispute. Even in a recent survey it was revealed that nearly 85% of the people trust the Supreme Court than the Parliament. The concept of Public Interest Litigation and Judicial activism by the Supreme Court is said to be the reason behind such popularity. The study also revealed that there is an extraordinary support for the institutions and in no other country can such support be seen for the Constitutional courts by the

ordinary public. This therefore clearly shows the public confidence and trust reposed by the masses of the country on the Supreme Court which is the ultimate guardian of their fundamental rights. The Supreme Court has withstood the test of times with the help of the weapon of Judicial Activism.

9. **Enthusiasm of individual players:** The application and development of the judicial activism can be attributed to many individual players. Some of them are civil rights activists, consumer rights groups, women rights advocates, groups for environmental action, bonded-labour groups, assorted-lawyer based groups etc. This is just a segment and not the complete list of the participants. This may seem than judicial activism is because of such collective measures, but it has also to be understood that individual role played by the judges too have contributed immensely to the growth of such activism. Without the role played by Krishna Iyer, P.N. Bhagwati, O. Chinappa Reddy and D.A. Desai, during the formative years of Public Interest Litigation there would not be the present case of wide activism by the judges in the areas of social action litigation.

   The following are the types of judicial actor classified based on the concept of judicial activism:

   (i) **The first judicial actors who laid foundation of judicial activism:** Personalities such as Desai, Chinnappa Reddy, JJ, extended the sphere of judicial activism for the protection of the bonded labours. Other actors such as Kuldip Singh J. in case of environmental jurisprudence, Justice K. Ramaswamy in case of rights of depressed class, Justice J.S. Verma in area of corruption in high places have contributed significantly for the growth of activism in these areas.
   (ii) **Restraintivist judicial actors:** Justice R.S. Pathak and Justice Venkatramaiah
   (iii) **Eclectic judicial actors:** Neither favourable nor hostile to the concept of judicial activism.
   (iv) **Gatekeeper judicial actors**
   (v) **Anti-activism judicial actors**
   (vi) **Revisionist judicial actors**

   There is yet another category of Superannuated Judicial Actors who are primarily the retired judges who have come to occupy important positions in various commissions such as the Law Commission, National Human Rights Commission, Press Council of India and Minorities Commission etc. These visible individuals play a vital role as conscience keepers. And one name if to be mentioned as the embodiment of all these roles and processes, Justice V.R. Krishna Iyer depicts a shining example of activist superannuated judicial actor.

The abovementioned reasons are the basis that compel the judiciary to play an active role or a conservative role based on the prevailing circumstances in the given society, government and in the world at large.

4.7.3 Judicial Activism and its Parameters (p-84)

There has been accepted there is a concrete relation between judicial power and judicial activism. The judiciary under any Constitution can play an active role when it carries out the following functions:

a. Interpreting the meaning and scope of the legislation made up by a competent authority.
b. Maintaining the balance between various constituent elements of the federation and between the union and the individual units.
c. Upholding the supremacy of the Constitution when such question is posed before it.
d. Protecting and upholding the fundamental rights of the people when such is guaranteed under the Constitution.
e. Dealing with the matters of institutional conflicts between legislature, executive and the judiciary.
f. Interpreting the Constitution as per the intention of its framers etc.

Thus, in all the above cases the judiciary in an active democracy can play a vital role through means of judicial review. The judiciary also on the other hand can refuse to entertain any matter posed before it. Such refusal is based on the grounds such as lack of jurisdiction or *doctrine of political questions*. The way, degree, and the amount of activism vary depending on the limitations as imposed by the Constitution and other factors like strength of other organs of the state and the willingness of the judiciary to play a political role in a changing society.

The criticism against such activist role of the courts is that it has usurped the legitimate powers of the other two organs of the state. Considering the role played by the American Supreme Court, it has never tried to block any legitimate major policy initiative taken by the Congress and the President. It did certainly strike down any law which was in contravention of the Bill of Rights, and it also struck down the means adopted by the Congress to bring about such legislations.

The abovementioned position is also applicable in case with India. Though the Supreme Court started to play activist role occasionally from *Golaknath vs. Punjab* (AIR 1967 SC 1643), and consistently from *Kesavananda Bharathi vs. State of Kerala* (AIR 1973 SC 1461), it never came in the way of Parliament to pursue the objectives as desired by the government. The traditional role of Courts to keep in check whether the other organs are functioning within the constitutional boundaries has always been carried out. The purpose of an independent court was to ensure that supremacy of the Constitution continued without any interference.

The real foe of absolutism is considered to be the law. It is the judicial realism and reasoned technique which resulted in emergence of judicial activism although its parameters differ in different constitutions around the world.

4.7.4 Typical Examples of Judicial Activism in India

Judicial activism in India is far wider, and more varied compared with its American counterpart. This is because of the fundamental ideals present in the Constitution. Apart from adhering to the principles of judicial review the Supreme Court has also upheld the idea of Constitutionalism, thereby giving itself even more and wider powers.

- As under Article 142(1) of the Constitution, the court exercises the power to do anything or give any direction to render complete justice.
- The court has also now assumed power aftermath of *Kesavananda Bharathi case* to test the validity of even the Constitutional amendment under the Article 368. And no court anywhere in the world exercises such power. This provision itself can be cited as the best example of judicial activism in India.

- Another instance which can be considered as Activism by the Judiciary was when the court exercised its mandate to give directions to some political leaders and bureaucrats, to compensate the State, for abusing the discretionary powers vested with them.
- This kind of direction to political leaders and bureaucrats is unheard of anywhere in the world. Such kind of power is exercised by the Court itself and it does not exist anywhere in the Constitution or in any statute.

The Supreme Court also refused to exercise its advisory jurisdiction under Article 143 in the matter of 'Ayodhya dispute' (*Ismail Farrouqui vs. Union of India*, (1994) 6 SCC 360). Such a kind of refusal itself is an act of judicial activism. And the Supreme Court has also resorted several times to Article 129 to punish for contempt against judiciary. In a case the Supreme Court initiated contempt proceedings against the person who had committed against a High Court and not the Supreme Court itself (*Re VinayChanraMisra* (1995) 2 SCC 584), but this was subsequently overruled and the question has been kept open.

- The Supreme Court has also broadened the scope of '*locus standi*' in cases involving violation of fundamental rights of the citizens, by initiating the concept of *Public Interest Litigation*.
- The credit for bringing in such change can be attributed to individual judges of the Supreme Court like Justice P.N. Bhagwati, Justice V.R. Krishna Iyer and Justice Kuldip Singh etc.
- The courts have also assumed the role of supervisors in certain criminal cases involving political bigwigs. In the popular scandal called the *fodder scam*, the Patna High Court asked the CBI (a central agency) to report its findings directly to the Court.
- Further the Supreme Court has assumed primacy in appointment and transfer of the judges of Supreme Courts and of the High Courts.
- The Supreme Court has held that the Chief Justice of India alone has the primacy in recommending the names of the judges.
- The Supreme Court has widened the scope of 'consultation' under Article 124 by interpreting that the Chief Justice should consult two senior most, and four senior judges before submitting such recommendation. Thus, the Supreme Court has the upper hand in the appointments of judges.

The other area where the Supreme Court exhibited such activism is while interpreting the Directive Principles of the State contained in Part IV of the Constitution. It made some of its provisions to be justiciable while interpreting the fundamental rights. The Court even directed the Parliament to enact a uniform civil code within a time bound period (*Sarala Mudgal vs. Union of India*, (1995) 3 SCC 635).

4.7.5 Judicial Activism in India before 1980s

It is indeed difficult to draw a clear pattern of behaviour of the courts before 1980s. The Courts seemed to be mechanical in its approach of interpreting the laws and approaching the problem presented before it. The Supreme Court rarely exhibited any activist behaviour before the 80s, more precisely before the emergency of 1975.

There has been an overwhelming opinion that the Courts in India during the 1940s and 1950s served the elite of the society who used it to further their interests, but within the

framework of the law. The law then generally favoured the landed-class and the agrarian reforms did not happen. Thus, the circumstances forced the judges to side with the landlords and hence the judiciary took a 'not-so-progressive' outlook.

During 1950s the government lost an opportunity to establish a people friendly judiciary. One important fact to be noted in this context is that the legal machinery of lawyers, judges, prosecutors all came from the same stock as before that is of same caste, class, attitude and orientation. Hence, this is one of the major reasons why the judiciary did not adopt a very progressive approach. Even some of the experts went on to call the Supreme Court before the 80s as a 'rich man's Court'. This is because alleged turning of the Supreme Court to an 'economic activist' to protect the '*status quo*' that led to judicial passivism.

Some of the important decisions of the court are as follows:

1. In *Vajravelu vs. Special Deputy Collector* (AIR 1965 SC 2017) the Supreme Court held that a differentiation or rates of compensation awarded for compulsory acquisition of private property between one for public purpose and another has no relation to the object of the Act, disputed in the case.
2. *L.C. Golak Nath vs. State of Punjab* (AIR 1967 SC 1643) is a landmark case. A special 11-judge bench was constituted to determine the validity of constitution (seventeenth amendment) Act, 1964. The court speaking through Subba Rao C.J. declared that:
   a. Constitutional amendment is a legislative process.
   b. Amendment is 'law' within the meaning of Article 13 of the constitution.
   c. Parliament has no power from the date of the decision to amend any provision of part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein etc.

   This judgment had secured the '*paramountcy of fundamental rights*' and established that even the constitutional amendment was subject to judicial review on the ground of violation of the fundamental rights. This has also laid down the doctrine of '*prospective overruling*' for the first time.
3. *Kesavananda Bharathi vs. State of Kerala (*AIR 1973 SC 1461) also called the Fundamental right's case, a 13-judge bench of the Supreme Court dealt with the validity of the Constitutional 24th Amendment, 25th Amendment and the 29th Amendment Acts. The summary of the verdict delivered by the majority nine out of the thirteen is as follows:
   a. Golak Nath's case was over ruled.
   b. Article 368 does not grant power to amend the basic structure or framework of the Constitution.
   c. The first part of Section 3 of the Constitutional (25th amendment) Act, 1971 is valid. And the second part wherein 'no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy' is invalid etc.

Basic Structure: The Court did not define what constitutes the basic structure, rather they chose to provide the various features as basic features of the Constitution. They include

(i) Constitution is Supreme
(ii) Republican and democratic form of the government
(iii) Secular nature of the Constitution
(iv) Separation of the powers between legislature, executive and the judiciary

(v) Federal character of the Constitution
(vi) Fundamental rights and freedom
(vii) Sovereignty of India
(viii) Mandate to build a welfare state and an egalitarian society
(ix) Any of the fundamental rights

The above list is only illustrative and not exhaustive. Thus, the Court has now given to itself unprecedented power which has unparallel anywhere in the world to test the validity of a Constitutional amendment.

4.7.6 Judicial Activism in India – Post 1980's

The following are the trends that emerged after the 1980s and are presently continuing.

1. **Expanding the scope of Article 21:** In the *Maneka Gandhi vs. Union of India* (AIR 1978 SC 597) the Supreme Court delivered an epoch-making judgement. Justice Bhagwati expanded the scope 'personal liberty' under Article 21. He declared that:

   the expression personal liberty in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some to them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.

   Another important aspect of this judgement is that it established the requirement of reasonableness of procedure in Article 21 through Article 14. This led to the conversion of 'procedure established by law' to 'due process of law' as given in the American Constitution. Since this judgement the Supreme Court has rendered a number of judgements expanding the Scope of Article 21 to include social rights, economic rights, human rights and legal rights which enable a man to lead his life with basic human dignity. Right to privacy, right to education, right-to-fair trial, right to health, right to gender equality, right against torture, right to livelihood, right to medical treatment are some of the various rights which are now included under the scope of Article 21– right to life.
2. **Curative petition:** The Supreme Court has invented a new tool for rendering complete justice called the *curative petition* in the case of *Rupa Ashok Hurra vs. Ashok Hurra* ((2002) 4 SCC 388). Justice Shah Mohammed Quadri in this case observed:

   The petitioners in these writ petitions seek reconsideration of the final judgements of this Court after they have been unsuccessful in review petitions and in that these cases are different from the cases referred above. The provision of the order XL Rule 5 of the Supreme Court Rule bars further application of review in the same matter. The concern of the court is now whether any relief can be given to the petitioners who challenge the final Judgement of this Court, though after disposal of review petitions complaining of the gross abuse of the process of the court and irremedialinjustice. In a State like India governed by Rule of Law, certainity of law declared and final decision rendered on merits in a list between the parties by the highest court in the court is of paramount importance. The principle of finality is insisted upon not on the ground that a judgement given by the Apex court is impeccable but on the maxim interest reipublicaeut sit finis litium.

   ...The upshot of the discussion in our view is that this Court, to prevent abuse of its process and to cur a gross miscarriage of justice, may reconsider its judgement in exercise of its inherent power.

3. **Fake encounter killing by police:** The Supreme Court in *Praskash Kadam vs. Ram Prasad Vishwanath Gupta* ((2011) 6 SCC 189) observed that

   …this is a very serious case and this cannot be treated like an ordinary case. The accused who are policemen are supposed to uphold the law, but the allegation against them is that they functioned as killers.

   … that in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake 'encounter' are nothing but cold-blooded, brutal murders by persons who are supposed to uphold the law. In our opinion if crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties.

4. **Honour killing:** In *Bhagwandas vs. State (NCT of Delhi)* ((2011) 6 SCC 396), the Supreme Court speaking through Justice Markanday Katju strongly disapproved the honour killings and advocated death penalty for those who are responsible for such killings. The court observed as follows:

   Before parting with this case we would like to state that "honour" killings have become common place in many parts of the country, particularly in Haryana, western Uttar Pradesh and Rajasthan. Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts. We have held in Lata Singh Case that there is nothing "honourable" in "honour" killings, and they are nothing but barbaric and brutal murders by bigoted persons with feudal minds. In our opinion honour killings, for whatever reason, come within the category of rarest of the rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behaviour. All persons who are planning to perpetrate "honour" killings should know that the gallow await them.

5. **Caste system:** In *ArumugamServai vs. State of Tamil Nadu* ((2011) SCC 405) the court called the caste system as a curse on the nation and observed as follows:

   In the modern age nobody's feelings should be hurt. In particular in a country like India with so much diversity we must take care not to insult anyone's feelings on account of his caste, religion, tribe, language, etc. Only then we can keep our country united and strong.

6. **Election duty and education:** In the *Election Commission of India vs. St.Mary's School* ((2008) 3 SCC 390) the Supreme Court held that the legal requirement to provide staff to the election commission should be read with restricted meaning to use teachers for this purpose. Because holding of election should not result in neglect of education of children due to absence of teachers from the schools.
7. **Privileges of the Parliament:** In *Raja Ram Pal vs. Hon'ble Speaker, Lok Sabha* ((2007) 3 SCC 184) based on a sting operation which showed the MPs demanding money for asking questions and an MP asking for money for letting a NGO work under the

MPLADs scheme. A five-judge Constitutional Bench held that the Court has jurisdiction to deal with such cases even though they may relate to legislative privileges.

8. **Role of judicial activism in unearthing black money:** The Supreme Court has exhibited extraordinary spirit of judicial activism in the absence of little or no action by the government in order to unearth the black money. In *Ram Jethmalani vs. Union of India* ((2011) 8 SCC 1) the court speaking through Justice B. Sudarshan Reddy directed the government to appoint a Special Investigation Team (SIT) to probe the issue of black money.

4.8 JUDICIAL REFORMS

4.8.1 Rural Courts

- One of the most important practical reform would be to constitute rural courts. The rural courts function within the territorial limits of the panchayats.
- If we see our structure of the Judiciary, we can clearly see that there are too many judges to decide the constitutional matters both in Supreme Court and High Courts, but there is a dearth of local judges administering judges in the districts. Thus, there is an imbalance.
- Not all people can approach the High Court and their first resort is the local court and thus local justice delivering mechanisms should be strengthened and a new kind of Courts called as Rural Courts should be set up in the villages to address the local issues and thus enabling people and bringing them closer to justice.
- The procedures of this kind of court should be simple and uncomplicated so that rendering of justice is made flexible.
- These courts moreover should operate in the local language and they should be empowered to visit villages and hear cases and record such evidence locally.
- Specific timeframe should also be fixed for delivering the verdicts.
- The Law Commission in its 114th report advocated setting up of 'Gram Nyayalaya' which had the following set up:
  - The rural courts should be appointed with Special Magistrates having jurisdiction over a town, or a part of a city or a group of villages.
  - These Special Magistrates should be appointed by District Judges for a term of three years.
  - They should have exclusive civil and criminal jurisdiction. In civil cases disputes up to one lakh should be taken and for criminal cases up to an imprisonment of one year.
  - Apart from these other matters related to certain civil disputes arising out while implementing the agrarian reforms, certain property and family disputes and other disputes as entrusted by the Law Commission should also be covered by the Courts.
  - In civil cases the revision of judgement can only be made by a District Judge and that too on the grounds of improper application of law and nothing else.
  - In criminal cases where imprisonment is awarded the appeal lies with the Sessions Judge.
  - The procedures are to be made simple and the verdict should be delivered within 90 days from receiving the complaint.

4.8.2 Indian Judicial Service

The subordinate courts are functioning with inordinate delays and lower efficiency. It is high time that Indian Judicial Service is set up as an All India Service under Article 312 of the Constitution.

- All the offices of the District and the Sessions Judges should be held by persons recruited under such service after such adequate training and exposure.
- It should be a meritocratic service with competitive recruitment, having high quality and given uniform training.
- It will make sure that there are high standards of probity and efficiency which will ensure speedy and impartial justice delivery.
- A good number of Judges for the High Court can also be drawn from this service.

4.8.3 Judicial Procedure

- The Criminal Procedure Code, the Civil Procedure Code and the Evidence Act have to be revised in order to address the present day judicial problems.
- In practice these laws have become burdensome, tardy and counter-productive.
- The right to get justice for criminal case within a year and for civil cases within two years should be guaranteed by the Constitution.
- All the laws should be amended to reflect such constitutional right.
- The appeals should also be strictly limited and only one appeal should be allowed for civil cases. Such appeals should be heard and verdict delivered within 3 months for a criminal cases and 6 months for a civil case.
- All the stays should be prohibited except in exceptional circumstances and also reason for such stay should be given in writing. And no stay should exceed 15 days.
- The time limits specified for adjudication should be strictly adhered to, even in cases involving stay orders.

4.8.4 Higher Courts

- The number of judges both in the Supreme Court and the High Courts should be substantially reduced and their appellate jurisdiction severely restricted.
- The jurisdiction of the Supreme Court should only cover matters related to interpretation of the Constitution and other matters of dispute arising between centre and the States or between two states. Thus, the Supreme Court has to function like a Constitutional Court and a Federal Court.
- The High Courts should only interpret the Constitution to matters relating to the State legislature.
- The appellate powers of the High Court should also be restricted in order to reduce its case load and for ensuring the sanctity and authority of the High Courts.
- Matter relating to service, taxation, disciplinary action against employees and other labour disputes should be dealt with special tribunals constituted for the same. Appeals

should lie to the High Courts only on grounds of interpretation of the Constitution and thus the verdict of the tribunals should be final is such cases.
- The writ jurisdiction which has now become all-encompassing should be restricted and focussed on right to life, liberty and equality before law. And the courts should have unfettered powers in such cases to enforce their directions.

4.8.5 Judicial Commission

- The mechanism of appointment of judges has become very problematic and ineffective.
- The Supreme Court taking upon itself the complete power of appointment has made the remedy worse than the disease.
- Nowhere in the world has the judiciary taken such role undermining the institutions and functions of both the legislature and the executive.
- This practice of judiciary appointing itself is both self-serving and counter-productive.
- Thus, a Judicial Commission of high standards has to be appointed from members drawn the executive, legislature and the judiciary.
- Such recommendation should be made binding on the President.
- The removal of Judges has become non-functional as under Article 124(4) the impeachment process is complicated and cumbersome, and hence no judge has ever been impeached. Such a situation whereby inefficient and corrupt judges functioning with impunity will lead only to judicial terrorism causing disaster to governance process and people in the society.
- Hence, such Judicial Commission should be empowered to try such errant judges and upon its recommendation the President should remove judges guilty of high crimes and transgressions.

4.8.6 Crime Investigation

- All the functions including crime investigation, intelligence gathering, law and order control, security of State and various other functions are all carried out by a single entity – the Police.
- Hence, they are over-burdened with numerous functions and not be able to do justice to any of them.
- Thus, the criminal justice system which is wholly dependent on the Police department is very ineffective and inefficient.
- Hence, there is need to revamp the criminal justice system completely. The courts should hold the police force accountable for their overall functioning.
- The police force should be insulated from the politics by placing the investigation process under direct control of the prosecutors who should be appointed as independent constitutional functionaries.
- By making the police force accountable to the Judiciary, various inhuman practices of torture, third degree and extra-judicial and fake encounters can be curbed.

4.8.7 Reinstatement of Values: Judicial Code of Conduct

- In the conference for the Chief Justice of all High Courts held in 1999, the following code for 'Restatement of Values for Judicial Life' was adopted. These would serve as guiding principles essential for functioning of an independent, strong, respected and impartial judiciary.
- These are not exhaustive but only illustrative of what is expected of the judges.
- These codes have been described as 'restatement of the pre-existing and universally accepted norms, guidelines and conventions' observed by Judges.
- There are complete code canons of judicial ethics. It is given as follows:
  - Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, any act of a Judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the credibility of this perception has to be avoided.
  - A Judge should not contest the election to any office of a Club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.
  - Close association with individual members of the Bar, particularly those who practice in the same court, shall be eschewed.
  - A Judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.
  - No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.
  - A Judge should practice a degree of aloofness consistent with the dignity of his office.
  - A Judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.
  - A Judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.
  - A Judge is expected to let his judgments speak for themselves. He shall not give interviews to the media.
  - A Judge shall not accept gifts or hospitality except from his family, close relations and friends.
  - A Judge shall not hear and decide a matter in which a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.
  - A Judge shall not speculate in shares, stocks or the like.
  - A Judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person. (Publication of a legal treatise or any activity in the nature of a hobby shall not be construed as trade or business).
  - A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund for any purpose.

- A Judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be got resolved and clarified through the Chief Justice.
- Every Judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held.

4.8.8 Judicial Standards and Accountability Bill

- This bill will replace the Judges Inquiry Act.
- This will be headed by former Chief Justice of India, and complaints of erring judges including the Chief Justices of High Courts and Supreme Court can be lodged by the public themselves.
- The five-member committee will be appointed by the President on recommendation of three-member panel consisting of the Prime Minister, any minister and the Leader of Opposition Lok Sabha.
- On receiving, the complaints are forwarded to the scrutiny committee which has the powers of a civil court.
- If the charges are proved the committee can request the concerned Judge to resign. If the Judge does not resign, the committee can forward such recommendation to the President for taking appropriate action.
- The bill also mandates that the Judges should not have any close association with the members of the Bar.
- All the details concerning the investigation of the Judges should be put up on the websites of the respective courts.

4.8.9 Judicial Restraint against the Activism

- The activism is not validated as the Courts should be concerned with the legality of law only.
- This also raises the question of accountability as the Judges are not elected representatives of the people and they are also not answerable to the executive or the legislature.
- The decision taken by the Bench too is not predictable.
- The role of activism by the judges encroaches upon the powers of other institutions of democracy and it is in violation of separation of powers.
- There should be a clear-cut procedure for acceptance of the cases filed under Public Interest Litigation. Frivolous cases should be rejected and only cases of substantial public importance should be taken up. It will reduce the burden on the judiciary.
- Hence, there is need for restraint by the judiciary which will help in maintaining the balance of the democratic and constitutional system.

4.8.10 Amendment of Contempt of Courts Act

The Contempt of Courts Act needs to be amended. It should reflect the present condition of the society and curb the unwielded power granted to the courts to punish anyone. Some of the few recommendations in this connection are as follows:

- Every accused punished under the Contempt of Court should be given a reasonable opportunity to be heard.
- The courts themselves should not try such contempt cases. The cases should be handed over to independent commission of the district concerned.
- The words in the act defining criminal contempt as 'scandalizing the court or lowering the authority of the court' should be amended.

4.8.11 Alert Civil Society

- The civil society has become the guardian of the democracy and it acts as the check against the transgressions by the state.
- The civil society thus has an active and vigilant role to play in the times of growing power of the judiciary.
- Literally there is no check against the Judiciary, none of the other democratic institutions could be able to check its growth. Hence, only public and the real people working and reflecting the wishes of the people manage to curtail its unbridled rise.
- The civil society can educate the public and raise in public opinion will have a great impact on the Courts as the judges themselves are first members of the society.
- Thus, the civil society can act as a check against active judiciary and it can be able to protect the rights of the people and gives voice to the populace.

4.8.12 Role of Media

- The media being the fourth pillar of the democracy has a very active role to play in reforming the judiciary.
- The opinion of the masses can be taken to the ivory towers of the courts only with help of the media.
- Earlier the media was silent because of the threat of contempt of court, but since it has now been amended the freedom of expression will not be infringed upon.
- Honest and credible media can indeed bring massive change in the democratic system. It not only reflects the opinion but also can shape-up opinions.
- In the present era of governance, the media has immense role to play. The people depend more on the words of the media. The focus of the media can indeed bring about change.
- This can be seen from the focus the media gave to the Nirbhaya rape case, whereby the trial was expedited and the accused were convicted to be hanged within a shorter period. The role of media should also be appreciated for focusing on various other cases also such as the Jessica Lal murder case, BMW accident case, Arushi Talwar murder case and numerous other corruption-related cases of high-profile ministers.

4.9 BANGALORE PRINCIPLES OF JUDICIAL CONDUCT

The following principles are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary.

These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct that bind the judge.

VALUE 1

Independence

Principle

Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute that the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free there from.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions that the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.

VALUE 2

Impartiality

Principle

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, as far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:

a. The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
b. The judge previously served as a lawyer or was a material witness in the matter in controversy; or
c. The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy; provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

VALUE 3

Integrity

Principle

Integrity is essential to the proper discharge of the judicial office.

Application

3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

VALUE 4

Propriety

Principle

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2 As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3 A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations that might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgement as a judge.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11 Subject to the proper performance of judicial duties, a judge may:

a. Write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

b. Appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

c. Serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

d. Engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12 A judge shall not practise law while the holding the judicial office.

4.13 A judge may form or join associations of judges or participate in other organizations representing the interests of judges.

4.14 A judge and members of the judge's family shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

VALUE 5

Equality

Principle

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ('irrelevant grounds').

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

VALUE 6

Competence and Diligence

Principle

Competence and diligence are prerequisites to the due performance of judicial office.

Application

6.1 The judicial duties of a judge take precedence over all other activities.

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the

making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for that purpose of the training and other facilities that should be made available, under judicial control, to judges.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

IMPLEMENTATION

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.